JUDGMENT

BACKGROUND

1. The Appellant, is a limited liability company incorporated on 13th April 2015 to solely deal with the Government in a program named Medical Equipment Services (MES), with no other business in the country.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5 of the Act, the Respondent is mandated with the duty of collection and receipt of all Government revenue. It is also mandated to administer and enforce all the provisions of the written laws as set out in parts 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

3. The Respondent carried out an investigation audit of the Appellant in the month of November 2017 and issued its audit findings through its letter dated 4th May 2018.
4. The Appellant responded and explained the issues through its letter dated 15\textsuperscript{th} May 2018.

5. The Respondent issued a tax assessment notice through its letter dated 19\textsuperscript{th} October 2018 for the period 2015-2017 disallowing input VAT amounting to Kshs. 249,024,127.00.

6. The Appellant filed an objection against the assessment notice through its letter dated 15\textsuperscript{th} November 2018.

7. The Respondent issued an Objection Decision vide a letter dated 11\textsuperscript{th} January 2019.

8. Being dissatisfied with the Respondent’s Objection Decision, the Appellant Appealed to the Tribunal vide a Notice of Appeal dated 29\textsuperscript{th} January and filed on 30\textsuperscript{th} January, 2019. This was followed by a Memorandum of Appeal dated 12\textsuperscript{th} February and filed on 13\textsuperscript{th} February, 2019 Appealing against the Respondent’s Objection Decision on the following grounds:

   a) The Assessment notice for the period is excessive and not in accordance with the company’s records.

   b) The Respondent’s decision to deny the company input VAT amounting to Kshs. 249,024,127.00 is highly punitive due to the fact that the input VAT incurred was in regard to supplies made by Debra Limited a related party which was subject to the same tax audit and had declared and paid the output tax which was claimed by the Appellant, through an additional Assessment notice issued by the Respondent.
c) The company had requested for the VAT obligation to be included in the tax PIN but it took a long time until the Respondent put the company under tax compliance audit. However, the company was subsequently put under investigation even before the tax compliance audit was complete.

d) Debra Limited was an agent of the Appellant and the input tax not claimed on time was on the agency fees and expenses incurred by Debra. Therefore, there was no revenue lost by the Government.

e) The Respondent failed to consider that the company was willing and actually paid all the tax not in dispute.

f) That the company management has been very co-operative in engaging KRA for a solution on the way forward.

9. The Appellant urged the Tribunal to accept the Appeal and order the Respondent to withdraw the Additional Assessment Notice accordingly.

**APPELLANT’S CASE**

10. The Appellant is a branch of Esteem Industries Inc. India, a registered partnership in India. The principal business of the Partnership is manufacturing and supplying laboratory, medical, surgical and scientific laboratory instruments, among others.

11. In 2015, the Appellant entered into a lease agreement with the Government of Kenya through the Ministry of Health (MoH) to provide Medical Equipment Services (MES) to 96 public hospitals in the country for a period of 7 years.
12. The Appellant appointed a local subcontractor, Debra Limited, to deal with all MES related services including installation, testing, fitting, user training, maintenance, replacement and decommissioning of the equipment.

13. Debra would bill the Appellant and the Appellant would bill the MoH. The VAT charged by Debra would be the input tax incurred by the Appellant. the Appellant would then charge the MoH output VAT and pay the difference to KRA (OUTPUT -INPUT).

14. The MES project was complex and a new concept in Kenya. The initial interpretation was that the project involved supply of medical services which are exempt under Section 4, Part II of the First Schedule to the VAT Act. That is why initially, the Appellant did not apply for the VAT obligation when obtaining its KRA Personal Identification Number (PIN) in April 2015.

15. When it was finally settled that the supply was subject to VAT, the Appellant applied for inclusion of VAT obligation. Unfortunately, the Appellant experienced delays in VAT obligation approval from KRA. Actually, the Appellant wrote to KRA through its letter dated 19th April 2017 seeking assistance.

16. The Appellant pointed out that it is not possible to file VAT returns and claim input VAT until one is registered for VAT.

17. As soon as the VAT obligation was approved in October 2017, the Appellant filed all its VAT self-Assessment returns for the period between March 2015 to September 2017. This shows that the failure to register, file and claim input VAT was not deliberate on the part of the Appellant. There was no intention on the Appellant’s part to evade or avoid accounting for VAT and as soon as it discovered the mistake, it commenced corrective measures on its own volition..
18. It is this filing that actually triggered a Compliance Audit and subsequent Investigation on request by the Appellant, which resulted in a VAT Assessment of Kshs. 249,024,127.00 on the basis that the input VAT claimed by the Appellant during the period was time barred.

19. The only input VAT for the Appellant is from invoices raised by Debra Limited to which all the aspects of the contract performance had been subcontracted. Debra would invoice the Appellant for the services (plus VAT) where the Appellant paid the invoice in full together with VAT. Debra declared and remitted this VAT to KRA in full as Output Tax. These were only 8 invoices, all from Debra, since the billing was quarterly. It is this input VAT incurred by the Appellant (paid to Debra) that the Respondent is denying the Appellant from claiming. Debra declared and remitted this VAT to KRA in full as Output Tax.

20. That since the Respondent had already collected all the output regarding this supply from Debra, there would be no revenue loss on the part of KRA as it has collected all the tax in full. In fact, if the Respondent was allowed to disallow the same input VAT incurred by the Appellant and collect it, it would be collecting tax twice on the same transaction (both from Debra and the Appellant). This is against a well-established principle of equity and goes against clear pronouncements by the Court that a taxpayer is not obliged to pay a single coin more than is due to the taxman.

21. The Appellant relied on Section 29 (1) of the Tax Procedures Act, 2015 (TPA) which requires that where a taxpayer has failed to submit a tax return, the Respondent can issue a default assessment and when making such an assessment the Respondent should consider all information as may be available and to the best of his judgement.
22. That in issuing this Assessment, the Appellant should have considered all the VAT incurred by the Appellant for the period of the Assessment since it had full knowledge of the information as it had already collected the corresponding output from Debra. Failure by the Respondent to consider such information would be in breach of the letter and spirit of Section 29 (1) of the TPA.

23. That in pursuance to Section 17 of the VAT Act, a taxpayer is entitled to a claim of all the input tax incurred in making taxable supplies. Clearly, and in no doubt, the Appellant incurred genuine input tax (same tax collected from Debra as output tax) which was used to make a taxable supply to the MoH. Therefore, the Appellant is entitled to claim this input VAT within the meaning of section 17 of the VAT Act.

24. That Article 159 of the Constitution of Kenya, 2010 stipulates that in exercising judicial authority, the Courts and Tribunals be guided by various principles among them that justice shall be administered without undue regard to procedural technicalities.

25. That the inadvertent failure by the Appellant to file returns and claim VAT within the set timelines is a mere procedural technicality that should not override equity and the right to claim the input tax that has been genuinely incurred by the Appellant.

26. That undue emphasis and consideration of the procedural technicality would cost the taxpayer a whopping Kshs. 249,024,127.00, plus further penalties and interest, all totalling Kshs. 482,829,716.00 as at the end of 2018 and still counting. This would be unjust, unfair and excessive punishment to the Appellant which is not commensurate to the offence it is accused of.
27. The Appellant states that it’s case is further backed by this honorable Tribunal’s recent (2020) decision in *Skylinetowers Investments Vs. Commissioner of Domestic Taxes*, whose facts are similar to its case. The Tribunal among other things said: -

   i) In conclusion “*the Respondent’s decision to disallow the deduction of input VAT amounts to imposition of a constructive penalty not provided by law*”.

28. That in the same circumstances, disallowing the deduction of input VAT by the Appellant amounts to imposition of an excessive and unfair constructive penalty of Kshs.249,024,127.00, plus further penalties and interest totalling Kshs. 482,829,716.00 as at the end of 2018 and still counting, which is not provided in law.

29. The Appellant avers that its argument is further supported by the Ruling in *Republic vs. Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR*, where the Court expressed itself as hereunder:

   “*This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman.*”

30. It is the Appellant's argument that if the Respondent is allowed to disallow and collect this input VAT, having already collected the output VAT from the subcontractor, then he will be collecting tax twice which is more than what is due to the taxman.
31. It is on this basis that the Appellant prays that this Honorable Tribunal, be
guided by equity, strict interpretation of the law, previous rulings and the
circumstance of this case to allow this Appeal and order the Respondent to
withdraw its entire Assessment and be stopped from demanding the tax,
interest and penalties in respect of this case.

**RESPONDENT'S CASE**

32. The Respondent carried out investigations into the affairs of the Appellant
which was identified as a Government supplier for the period 2015-2017 to
establish the Appellant's tax compliance status.

33. The investigations revealed that the Appellant had filed nil returns for the
period May 2015 to August 2017 and filed credit VAT returns for the month
of September 2017 claiming Withholding Tax of Kshs. 17,887,458.00.

34. In the month of October 2018 the Appellant had lumped up all the vatable
sales from prior periods (May 2015-August 2017) together with sales for the
month of October. The Respondent redistributed the invoices accordingly to
reflect the correct tax point.

35. Similarly, the Appellant had lumped up all its input tax from inception and
claimed them in the month of October 2017. The Respondent redistributed
the same accordingly to reflect the correct tax point.

36. Further investigations revealed that the Appellant had failed to withhold and
account for payments in the form of agency fees to Debra Ltd (an associated
company) in contravention of the provisions of Section 35 of the Income Tax
Act.
37. The Respondent contends that based on information availed by the Appellant, and third party information collected through investigation, the Commissioner gave a Notice of Assessment of Tax for the period in question.

38. The Respondent contends that it took into consideration all information provided by the Appellant in reaching its Objection Decision including documents provided by the Appellant. It also gave reasons for its decision.

39. The Respondent avers that the Appellant cannot allege that the Assessment was excessive without providing the Commissioner with evidence to that effect or evidence to show that there are just reasons for adjustments to be made to the assessment.

40. The Appellant failed to register for VAT as required under the provisions of Section 34(1) of the VAT Act despite having met the criteria for registration.

41. Investigations revealed that the Appellant had filed nil returns for the period May 2015 to August 2017.

42. Further, investigations established that the Appellant was receiving huge payments through IFMIS which was inconsistent with its tax filing reports. In addition, there was evidence of withholding tax VAT deducted from the Ministry of Health which did not have corresponding output tax declaration by the Appellant.

43. This was in contravention of the obligations of a taxpayer regarding application for registration for VAT, filing of VAT returns and payment of taxes due.
44. In the circumstances, the Respondent undertook forceful registration of the Appellant pursuant to the provisions of Section 34(6) of the VAT Act and backdated the same to May 2015 which was the time the Appellant was known to have made taxable supplies within the statutory threshold.

45. The Respondent disallowed time barred input tax, (input tax incurred between May 2015 and January 2017) amounting to Kshs. 249,024,127.00. pursuant to the provisions of Section 17 of the VAT Act. The said provision requires that input tax be claimed within Six (6) months.

46. In view of the foregoing, it is the Respondent’s considered view that the taxes outlined in its Objection Decision were raised in conformity with the provisions of the applicable laws and are due from and payable by the Appellant.

47. The Respondent therefore prays that this Appeal be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

48. Having considered the arguments of the parties, the Tribunal has identified only one fundamental cause of the dispute and framed the following issues for determination:

a. Whether the Appellant should be allowed a deduction of input VAT amounting to Kshs. 249,024,127.00 incurred between May 2015 and January 2017?

b. Whether disallowing the deduction of input VAT amounts to imposition of an excessive and unfair constructive penalty of Kshs. 249,024,127.00, plus further penalties and interest totalling Kshs. 482,829,716.00 which is not provided in law.
ANALYSIS AND FINDINGS

a. Whether the Appellant should be allowed a deduction of input VAT amounting to Kshs. 249,024,127.00 incurred between May 2015 and January 2017

49. The main thrust of the Appellant's argument is that the input tax the deduction of which it is claiming has already been paid and accounted for as output tax by Debra Ltd., the company that it subcontracted to perform the contract on its behalf. Therefore, to deny it the deduction would amount to double taxation, would be unfair, contrary to the law and a breach of its constitutional rights.

50. Further, that the delay in registration for VAT was due to lack of clarity on whether the MES contract was subject to VAT and indeed as soon as this was clarified, it immediately attempted to register but the system failed them. The failure to register for VAT was therefore not intentional.

51. The Appellant stated that its case is further backed by this Honorable Tribunal's recent (2020) decision in Skylinetowers Investments Vs. Commissioner of Domestic Taxes, whose facts are similar to its case. In this case, the Tribunal made the following very important observations:

i. “it is a cardinal rule and well-established principal of taxation that statutes must be interpreted strictly and that taxation must be on clear provisions of the law as has been held in case of BRANDYSYNDICATE VS. INLAND REVENUE COMMISSIONER”.

ii. “requirement for filing VAT monthly returns was not a condition for deduction of input tax. In the absence of any other clear, certain and unambiguous legal provisions requiring the Appellant to file a VAT3 return in order to claim an input tax deduction, the Appellant is entitled to deduct input tax for the period under review”.
iii. "if it was the intention of the Legislature to requiring the filing of a VAT return before an input claim is allowed, the VAT legislation would have provided so."

iv. In conclusion "the Respondent's decision to disallow the deduction of input VAT amounts to imposition of a constructive penalty not provided by law".

52. The Appellant avers that it's argument is further supported by the Ruling in Republic vs. Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR, where the Court expressed itself as hereunder:

"This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman."

53. The Respondent on the other hand argue: that: -

I. The Appellant failed to register for VAT as required under the provisions of Section 34(1) of the VAT Act despite having met the criteria for registration.

II. Its investigations revealed that the Appellant had filed nil returns for the period May 2015 to August 2017.

III. Further, investigations established that the Appellant was receiving huge payments through IFMIS, inconsistent with its tax filing reports. In addition, there was evidence of withholding tax VAT deducted from the Ministry of Health which did not have corresponding output tax declaration by the Appellant.
IV. This was in contravention of the obligations of a taxpayer regarding application for registration for VAT, filing of VAT returns and payment of taxes due.

V. In the circumstances, the Respondent undertook forceful registration of the Appellant pursuant to the provisions of Section 34(6) of the VAT Act and backdated the same to May 2015 which was the time the Appellant was known to have made taxable supplies within the statutory threshold.

VI. The Respondent disallowed time barred input tax amounting to Kshs. 249,024,127.00. pursuant to the provisions of Section 17 of the VAT Act. The said provision requires that input tax be claimed within Six (6) months.

VII. Therefore, input tax incurred between May 2015 and January 2017 was disallowed.

VIII. In view of the foregoing, it is the Respondent’s considered view that the taxes outlined in its objection decision were raised in conformity with the provisions of the applicable laws and are due and payable from the Appellant.

54. The Tribunal has carefully considered the arguments of both parties and observes as follows:

55. The Value Added Tax Act, 2013 (the Act) provides for deduction of input tax in accordance with the provisions of section 17 under Part VI as follows:

"PART VI—DEDUCTION OF INPUT TAX"
17. (1) Subject to the provisions of this section and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies. (2) If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation.

Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred."

56. The Act gives some leeway for the deduction of input tax to be deferred, where documentation is not readily available, until the first tax period in which the person holds such documentation. This however, must not be done after the expiry of six (6) months from the end of the tax period in which the supply or importation occurred."

57. In the instant case, the input tax claimed by the Appellant was incurred in the period May 2015 to August 2017 and was being claimed for deduction in October 2017. Did this claim meet the criteria set out above?

58. The Appellant, by its own admission, had not registered for VAT for the reasons stated hereinbefore, however, the Respondent, avers that it undertook forceful registration of the Appellant pursuant to the provisions of Section 34(6) of the VAT Act and backdated the same to May 2015 which was the time the Appellant was known to have made taxable supplies within the statutory threshold.
59. The Appellant further argues that registration is not a prerequisite for
deduction of input tax and buttresses its argument by relying on the Tribunal’s recent (2020) decision in **Skylinetowers Investments Vs. Commissioner of Domestic Taxes**, in which the Tribunal made the following observations:

   i. “it is a cardinal rule and well-established principal of taxation that statutes
      must be interpreted strictly and that taxation must be on clear provisions
      of the law as has been held in case of **BRANDYSYNDICATE VS. INLAND
      REVENUE COMMISSIONER**.”

   ii. “requirement for filing VAT monthly returns was not a condition for
deduction of input tax. In the absence of any other clear, certain and
unambiguous legal provisions requiring the Appellant to file a VAT3 return
in order to claim an input tax deduction, the Appellant is entitled to deduct
input tax for the period under review”.

   iii. “if it was the intention of the Legislature to requiring the filing of a VAT3
return before an input claim is allowed, the VAT legislation would have
provided so.”

   iv. In conclusion “the Respondent’s decision to disallow the deduction of
input VAT amounts to imposition of a constructive penalty not provided
by law”.

60. The Tribunal couldn't agree more with the above decision. However, it is not
entirely true that the cases are similar. In the **Skylinetowers Investments case**, although the issue was deduction of input tax, the reduction thereof was being
disallowed, inter alia, on the grounds that the Appellant was not registered for
VAT. Further, the Appellant had claimed input tax and presented invoices to
support its claim within the timelines provided by law.
61. In the instant case, the Appellant was neither registered for VAT nor did it present a claim in any form until October 2017.

62. The Tribunal also agrees with the Appellant's argument that statutes must be interpreted in their literal meaning as drafted. This is in tandem with the oft quoted decision in **CAPE BRANDY SYNDICATE VS. INLAND REVENUE COMMISSIONER** as quoted in the Tribunal's recent (2020) decision in **Skylinetowers Investments Vs. Commissioner of Domestic Taxes** as follows: -

   "it is a cardinal rule and well-established principal of taxation that statutes must be interpreted strictly and that taxation must be on clear provisions of the law as has been held in case of **BRANDYSYNDICATE VS. INLAND REVENUE COMMISSIONER**."

63. In the instant case, the input tax claimed by the Appellant was incurred in the period May 2015 to August 2017 and was being claimed for deduction in October 2017. It is the Tribunal's opinion that this claim did not meet all the criteria of Section 17 of the Act as set out above in that the input tax was not deducted at the end of the period during which the supply or import was made.

64. Further, the Appellant failed to comply with Section 17 (2) which allows for a late claim as follows: -

   "If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection (3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation.

   Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred."
65. The input tax claimed by the Appellant was incurred in the period May 2015 to August 2017 and was being claimed for deduction in October 2017; more than two years after the end of the tax period in which it was deducted. This is clearly contrary to the plain and clear wording of the proviso to Section 17 (2).

66. The Tribunal therefore agrees with the Respondent in its argument that it disallowed time barred input tax amounting to Kshs. 249,024,127.00. pursuant to the provisions of Section 17 of the VAT Act which requires that input tax be claimed within Six (6) months.

b. Whether disallowing the deduction of input VAT amounts to imposition of an excessive and unfair constructive penalty of Kshs. 249,024,127.00, plus further penalties and interest totalling Kshs. 482,829,716.00 which is not provided in law.

67. The Appellant argues that Article 159 of the Constitution of Kenya, 2010 stipulates that in exercising judicial authority, the Courts and Tribunals ought to be guided by various principles among them, that justice shall be administered without undue regard to procedural technicalities.

68. According to the Appellant, its inadvertent failure to file returns and claim VAT within the set timelines is a mere procedural technicality that should not override equity and the right to claim the input tax that it had genuinely incurred.

69. The Appellant argues that undue emphasis and consideration of the procedural technicality would cost the Appellant a whopping Kshs. 249,024,127.00, plus further penalties and interest, all totalling Kshs. 482,829,716.00 as at the end of 2018 and still counting. That this would be unjust, unfair and excessive
punishment to the Appellant which is not commensurate to the offence it is accused of.

70. The Appellant stated that its case is further backed by this Honorable Tribunal’s recent (2020) decision in **Skylinetowers Investments Vs. Commissioner of Domestic Taxes**, whose facts are similar to its case. In this case, the Tribunal made the following very important observation:

   “In conclusion “the Respondent’s decision to disallow the deduction of input VAT amounts to imposition of a constructive penalty not provided by law”.

71. The Respondent argues that in the month of October 2017 the Appellant had lumped up all the vatable sales from prior periods (May 2015-August 2017) together with sales for the month of October 2017 and the Respondent redistributed the invoices accordingly to reflect the correct tax point.

72. Similarly, the Appellant had lumped up all its input tax from inception and claimed them in the month of October 2017. The Respondent redistributed the same accordingly to reflect the correct tax point.

73. The Respondent contends that it took into consideration all information provided by the Appellant in reaching its Objection Decision including documents provided by the Appellant. It also gave reasons for its decision.

74. Having considered the issue and arguments of both parties, the Tribunal notes that it was the Appellant’s own failure to claim input tax within the time frame provided by law that has visited this misery upon it. The Respondent has performed its mandated duty in disallowing the input tax that was time barred.
75. Further, it is the Respondent’s responsibility to impose penalties and interest where tax is outstanding. This is in accordance with the provisions of Section 38 of the Value Added Tax Act, among other provisions of the Law as may be applicable to imposition of penalties and interest in respect of outstanding taxes.

76. It is therefore the Tribunal’s considered view that the Appeal fails on this point. The option available to the Appellant is to take advantage of the provisions relating to remission of penalties and interest to apply to the Respondent to consider remitting the penalties and interest in view of the circumstances of this matter.

**FINAL ORDERS**

77. In view of the above findings, it is hereby Ordered as follows: -

   a. The Appeal be and is hereby dismissed.

   b. The claim for deduction of input VAT amounting to Kshs. 249,024,127.00 incurred between May 2015 and January 2017 is time barred and hence not deductible.

   c. Each party to bear its costs.

78. It is so ordered.
DATED and DELIVERED at NAIROBI on this 16th day of April, 2021.

PATRICK LUTTA
CHAIRPERSON

HELEN BILA
MEMBER

MWAI MBUTHIA
MEMBER

ELISHAH NJERU
MEMBER

HABON FARAH
MEMBER